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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1996

SUBARU OF AMERICA, INC., AND
FUJI HEAVY INDUSTRIES, INC., PETITIONERS

v.

STEVEN D. COMPTON, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent's brief is notable for what it does *not* say. First, respondent does not deny the enormous practical significance of the questions presented. Second, he does not dispute that there is substantial confusion in the lower courts on how to apply the mandate of *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to expert engineering testimony. And third, although respondent devotes most of his argument to contending that the result below is correct (Opp. 11-19), he makes no effort to defend the Tenth Circuit's essential holding: that the trial court's "gatekeeper" responsibilities under *Daubert* may be bypassed altogether if an expert proposes to rely on his "training" or "experience" rather than on any "technique" or "methodology" of his discipline.

Instead of disputing these reasons why review should be granted, or defending the Tenth Circuit's reasoning, respondent seeks to persuade the Court that this case is a poor vehicle to resolve the certworthy issues identified in the petition. Thus, respondent maintains that the Tenth Circuit did not mean what it said; that the issue presented here is "factbound"; that the district court in actuality applied the *Daubert* factors in ruling on the admissibility of Bihlmeyer's testimony; and that the court of appeals' disposition is correct because engineering testimony is not rooted in "scientific knowledge" and therefore not subject to review under *any* of the reliability criteria identified in *Daubert*. Respondent's strained efforts to rewrite the lower courts' opinions, and to explain away the serious intercircuit conflicts (Pet. 11-21), are unpersuasive. Further review is plainly warranted.[1]

1. Without denying the widespread confusion in the lower courts, respondent maintains (Opp. 21-26) that there is no

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[1] Much of respondent's brief is devoted to matters that are largely irrelevant to the issues presented in this case, such as Bihlmeyer's *qualifications* (as opposed to the *methodology* underlying Bihlmeyer's "engineering analysis" (Opp. 19)), the qualifications of *petitioners'* engineering expert (the admissibility of whose testimony respondent never challenged at trial), and an aspect of this Court's decision in *Daubert* (rejection of the *Frye* test) that is not directly implicated here. See Opp. 2-4, 5 n.5, 11, 14, 18 nn.9-10, 19.

intercircuit conflict. But the petition identified three distinct areas in which conflicts have developed in the courts of appeals on issues that are relevant to the questions presented in this case.

First, we explained (Pet. 14-16) that the decision below is inconsistent with at least three decisions of the Seventh Circuit, which hold that expert scientific testimony that would otherwise be subject to the *Daubert* framework may not avoid such scrutiny merely because the expert purports to rely on "experience" or "observation" rather than on the pertinent scientific methodology. See Pet. 14-15 & n.4. *Second*, we identified a deep conflict in the treatment of expert *engineering* testimony: the Second and Tenth Circuits have refused to apply the *Daubert* framework and factors to such testimony, whereas the Seventh and Eighth Circuits have strictly applied *Daubert* to expert engineers. Pet. 16-19 & nn.5-6. *Third*, we explained that the "Tenth Circuit's substantial reliance * * * on Bihlmeyer's experience" as an expert witness is "in significant conflict with the approach of other circuits," including the Fourth and Eighth Circuits (and, to a lesser extent, the Seventh and Ninth Circuits). Pet. 20-21.

Notably, respondent makes no effort to deny the existence of the third conflict. Instead, he focuses on the first two areas of conflict, which he lumps together. See Opp. 21-24. With regard to the first area (bypass of *Daubert* where an expert bases testimony on "experience" or "training"), respondent does not dispute that the Tenth Circuit's opinion is in direct conflict with the Seventh Circuit decisions in *O'Conner*, *Rosen*, and *Deimer*. See Pet. 14-15. Instead, respondent maintains that the conflict is *even deeper* because the Third, Fifth, and Ninth Circuits have all agreed with the Tenth Circuit on this point. The cases cited by respondent, however, do not support even that limited claim.

Contrary to respondent's contention (Opp. 23), *Holbrook* v. *Lykes Bros. S.S. Co.*, 80 F.3d 777 (3d Cir. 1996), does not stand for the proposition that an expert physician testifying on an issue of medical causation need not adhere to the rigorous methods and techniques of his scientific discipline. Rather, the Third Circuit in *Holbrook* affirmed the trial court's decision to admit the testimony because, "[a]s required by *Daubert*," the experts in question employed "procedures for examining the facts presented to them and * * * research methodologies" that were "based on the

methods of science." *Id.* at 785. Thus, *Holbrook* is fully consistent with the Seventh Circuit's decisions in *O'Conner* and *Rosen* concerning medical causation testimony. See also *Cavallo* v. *Star Enterprise*, 1996 U.S. App. LEXIS 30033, at *26 (4th Cir. Nov. 20, 1996) (in upholding exclusion of testimony of two toxicologists, explaining that *Daubert* "require[s] that the methodology and reasoning used by a witness have a significant place in the discourse of experts in the field").[2]

Respondent also contends that in another case involving a medical expert, the Fifth Circuit adopted an approach similar to the Tenth Circuit's. Opp. 23-24 (citing *Carroll* v. *Morgan*, 17 F.3d 787 (5th Cir. 1994)). In affirming the district court's decision to admit this testimony, however, the Fifth Circuit in *Carroll* explained that the experts' testimony was fully "ground[ed] in the methods and procedures of science." 17 F.3d at 790 (internal quotations omitted). That analysis is completely inconsistent with the Tenth Circuit's pointed *refusal* to evaluate whether Bihlmeyer's testimony was grounded in the methods and procedures of engineering science.

Indeed, as the *amici* point out (Brief for the Chemical Manufacturers Association and the Chamber of Commerce of the United States of America As *Amici Curiae* ("CMA/Chamber Br.") 6-7; Brief of the Product Liability Advisory Council, Inc., and National Association of Manufacturers As *Amici Curiae* ("PLAC/NAM Br.") 6, 10), the Fifth Circuit has in fact *rejected* the mode of analysis used by the Tenth Circuit in this case — and done so in a product liability action involving an engineering expert. As noted in the petition (at 15 n.4), a district court in the

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[2] Respondent is correct, however, in recognizing that the Tenth Circuit's reasoning could be invoked to evade the requirements of *Daubert* in cases involving questions of medical causation — a point that has not been lost on the plaintiffs' bar. See *Plaintiff, Defense Lawyers Battle Over Application of Daubert in Implant Cases*, 4 MEALEY'S LITIGATION REPORT: BREAST IMPLANTS 6 (Oct. 10, 1996) (summarizing argument advanced by plaintiff's lawyer at annual breast implant conference that, in light of "the 10th Circuit U.S. Court of Appeals' recent decision in Compton v. Subaru," *Daubert* "has no application to causation opinions by a patient's treating physician").

Fifth Circuit applied the *Daubert* factors and framework to evaluate the admissibility of engineering testimony concerning whether an automobile seatback was defectively designed. In a decision recently affirmed by the Fifth Circuit, the district court refused to admit the testimony because it failed to "reflect the application of any particular methodology." *Brown* v. *Miska*, 1995 U.S. Dist. LEXIS 17197, at *11 (S.D. Tex. July 19, 1995), aff'd, 96 F.3d 1445 (5th Cir. Aug. 29, 1996) (table). Thus, the Fifth Circuit has sided with the Seventh Circuit and against the Tenth Circuit in this debate.[3]

Respondent is equally unsuccessful in his attempts to explain away the extensive intercircuit conflict (see Pet. 16-19 & nn. 5-6) in the *second* area — the approach taken by courts to the admissibility of expert engineering testimony. See also PLAC/NAM Br. 7-12; CMA/Chamber Br. 9-14. Respondent agrees that the Second Circuit, like the Tenth Circuit, refuses to apply the *Daubert* framework to engineering testimony. Opp. 21-22. He argues, moreover, that the First Circuit falls into this camp as well. See *id.* at 21 (citing *Vadala* v. *Teledyne Indus.*, 44 F.3d 36 (1st Cir. 1995)). Respondent misreads *Vadala*, which says only that *Daubert*'s rejection of the *Frye* test has no application to a case "in which the dispute concerns an event rather than a scientific law." 44 F.3d at 39. The First Circuit affirmed the trial court's exclusion of the expert testimony on the ground that it lacked sufficient "fit" under *Daubert*. *Ibid.*

Finally, respondent argues that the Seventh and Eighth Circuit cases we cite as stringently applying *Daubert* to engineering testimony are "either distinguishable or reconcilable as depending on the facts and involving the application of an abuse of discretion

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[3] Contrary to respondent's assertion, the Ninth Circuit in *Thomas* v. *Newton Int'l Enterprises*, 42 F.3d 1266 (1994), did not permit an expert to forgo reliance on the traditional methods and techniques of a scientific discipline (such as engineering) and to rely instead solely upon his "experience" or "observation." The expert in *Thomas* had no such discipline to abandon. And in any event, the kind of direct factual observations at issue in *Thomas* are hardly comparable to the "engineering analysis" (Opp. 4, 10, 19) and judgments at issue in this case. See PLAC/NAM Br. 12 n.3; CMA/Chamber Br. 13-14.

standard of review." Opp. 24; see *id.* at 24-26. That argument is also incorrect. In *Cummins* v. *Lyle Indus.*, 93 F.3d 362 (7th Cir. 1996), for example, the Seventh Circuit stated that is was reviewing "de novo * * * whether the district court properly followed the analytical framework established in *Daubert*." *Id.* at 367. The court went on to explain its legal conclusions that engineering testimony pertains to scientific knowledge within the meaning of *Daubert* and that the admissibility of such testimony must be evaluated under the *Daubert* factors. *Id.* at 367-68 & n.2. In like fashion, the Eighth Circuit in *Peitzmeier* v. *Hennessy Indus., Inc.*, 97 F.3d 293 (1996), resolved *de novo* the "threshold" legal question of whether the *Daubert* factors apply to engineering testimony or only to "novel scientific testimony." *Id.* at 297. Respondent's attempts to explain away the conflict between these decisions and the decision below are therefore wholly unavailing.

2. Unable credibly to deny that the lower courts have provided sharply divergent answers to the important and recurring issues identified in the petition, respondent resorts to a scattershot of arguments designed to persuade the Court that this case is a poor vehicle to resolve those issues.

a. Respondent first maintains that review should be denied because this case presents only the "factbound" issue of whether the district court "abused its discretion" in admitting Bihlmeyer's testimony. Opp. 9-10, 17-19; see also *id.* at i. That argument is meritless.

In explaining the standard of review applicable to rulings on the admissibility of expert testimony, the Tenth Circuit stated that threshold issues concerning *Daubert*'s "relevance" and "applicability" — including the question "whether the district court properly followed the framework set forth in *Daubert*" — are "question[s] of law which this court reviews **de novo**." Pet. App. 6a (emphasis in original) (internal quotations omitted). Accord Compton C.A. Br. 17 ("The appellate court conducts a de novo review of whether the district court properly followed the framework set forth in *Daubert*[ ]."). The court of appeals added that "once we determine *Daubert*'s relevance and application, our review of the district court's decision to admit expert testimony is * * * for abuse of discretion." Pet. App. 6a.

As we have explained (Pet. 7-8, 11-12, 14), the Tenth Circuit decided this case by holding that the "new framework" announced in *Daubert* is "*applicable only* when a proffered expert relies on *some principle or methodology*," and not when "expert testimony is based solely upon *experience or training*." Pet. App. 7a, 8a (emphasis added). That holding resolves a purely legal question concerning *Daubert*'s "relevance" or "applicability" — a question that is reviewable *de novo*. The panel did not even remotely suggest that, in deciding this legal issue, it was deferring to the discretion of the district court. On the contrary, the panel observed that it was free to affirm the district court "on any grounds for which there is a record sufficient to permit *conclusions of law*." Pet. App. 9a n.3 (emphasis added) (internal quotations omitted). That statement soundly refutes respondent's claim. See also PLAC/NAM Br. 5.

Respondent also argues that the proper characterization of Bihlmeyer's engineering testimony under Rule 702 (as rooted in "technical" rather than "scientific" knowledge) represents a "factual finding" made by the district court. Opp. 9. This argument rests on a mistaken premise. During the hearing on admissibility, the district court stated that "clearly there's some scientific knowledge involved in the testimony of Mr. Bihlmeyer." Pet. App. 25a; cf. *id.* at 17a ("*Viewed most favorably to plaintiff*, Bihlmeyer did not offer any 'scientific' opinions.") (ruling on Rule 50 motion). In any event, respondent offers no reason to believe that the Tenth Circuit — like other appellate courts — would treat the characterization issue as anything other than a question concerning *Daubert*'s "applicability" that is reviewable *de novo*. See *Peitzmeier*, 97 F.3d at 297; *Cummins*, 93 F.3d at 367 n.2. See also PLAC/NAM Br. 14-15.

b. Next, respondent maintains that the Tenth Circuit's decision did not rest on an outright refusal to apply *Daubert* but rather on a more limited refusal to apply the *Daubert* factors. According to respondent, the Tenth Circuit (1) "held that * * * Bihlmeyer's testimony met the Rule 702 criteria of relevance and reliability" but (2) "determined that in the absence of *scientific* testimony presenting *some novel principle or methodology*, use of the * * * *Daubert* factors is unwarranted." Opp. 16 (emphasis added). This argument for denying review should also be rejected.

Contrary to respondent's assertion, neither the Tenth Circuit nor the district court actually evaluated Bihlmeyer's testimony for evidentiary reliability, as respondent now concedes *Daubert* requires. See Opp. 13. The Tenth Circuit merely applied its pre-*Daubert* case law, which the court regarded as unaffected by *Daubert* in a case of this kind. See Pet. App. 6a-8a. As the panel explained, under the Tenth Circuit's pre-*Daubert* cases, "as long as a *logical basis* exists for an expert's opinion . . . the weaknesses in the underpinnings of the opinion[ ] go to the weight and not the admissibility of the testimony." *Id.* at 6a (internal quotations omitted) (emphasis added). The district court, the panel explained, fulfilled its obligations under Rule 702 and *Daubert* by determining that Bihlmeyer's testimony was "facially helpful." *Id.* at 9a.

As the district court candidly acknowledged, the Tenth Circuit's pre-*Daubert* approach is one of "*extreme liberality* with respect to admissibility of expert testimony in product liability cases." Pet. App. 25a (emphasis added). That approach simply fails to discharge the gatekeeping responsibilities mandated by *Daubert*. It is one thing to determine whether an expert's testimony rests upon a "reliable basis in the knowledge and experience of [the expert's] discipline." *Daubert*, 509 U.S. at 592. It is quite another merely to ask whether expert testimony is "facially helpful" or rests on some "logical basis." Testimony that appears to have a logical basis or that is facially helpful may nevertheless be methodologically unsound or improperly premised upon "subjective belief or unsupported speculation." *Id.* at 590. See PLAC/NAM Br. 17-18. The panel was mistaken in concluding that it could continue to apply such an approach after *Daubert*.

Equally mistaken is respondent's contention that the Tenth Circuit's decision rested on a determination that the *Daubert* factors were inapplicable because engineering testimony is "nonscientific" in nature. Although in the Tenth Circuit respondent "characterize[d] Mr. Bihlmeyer's testimony as nonscientific and argue[d] [that] *Daubert* is inapplicable to such evidence," the court of appeals expressly stated that it was "unnecessary to reach" that question. Pet. App. 9a; see *id.* at 2a n.1. "Absent some particular methodology or technique," the court stated, "*Daubert*

simply has little bearing on Mr. Bihlmeyer's testimony." *Id.* at 9a.[4]

Although the Tenth Circuit did not resolve the question whether *Daubert* applies to nonscientific expert testimony, respondent's brief signals his clear intention, if review is granted, to argue for affirmance on this basis (as well as to argue that engineering testimony is "technical" rather than "scientific" within the meaning of Rule 702). See Opp. 13, 16-17. The presence of these issues further enhances the certworthiness of this case. It is now clear that, if review is granted, the Court will be called upon to decide three issues that are fairly encompassed within the questions presented: (1) May the requirements of *Daubert* be bypassed altogether where an expert proposes to rely not on any method or technique utilized in his area of expertise but rather on his "experience" or "training"? (2) Do the *Daubert* factors apply exclusively to expert testimony that is based on "scientific" knowledge (and not, in whole or in part, to testimony based on technical or other specialized knowledge)? and (3) If the answer to the second question is yes, is engineering testimony "scientific" under Rule 702? The latter two questions have also engendered conflicts in the circuits and are plainly worthy of this Court's review. See Pet. 16 n.5, 17-19.

c. Respondent next argues (Opp. 20) that the district court *in fact* "applied *Daubert* but concluded that most of the *Daubert* factors did not support the exclusion of Bihlmeyer's testimony." That is a misreading of the district court's opinion.

It is true that the district court stated, in denying petitioners' post-trial motion for judgment as a matter or law, that "to the extent *Daubert* is applicable to Bihlmeyer's opinions, the *Daubert* requirements are satisfied." Pet. App. 19a. It made that state-

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[4] Just as respondent declines to defend the Tenth Circuit's actual holding, he provides no response to our argument that the specific factors articulated in *Daubert* for assessing reliability apply to *all* expert testimony that is based on "scientific" knowledge. Instead, respondent rebuts an argument we never made: that every one of the *Daubert* factors must be rigidly applied, without modification, to "*all* scientific, *technical and other specialized expertise*." Opp. 17 (emphasis added).

ment, however, only after determining that *none of the Daubert factors applied to engineering testimony such as Bihlmeyer's*. Thus, after summarizing the four factors identified in *Daubert*, the district court explained that "[t]hree of these factors have *no logical application* to Bihlmeyer's opinions." *Id.* at 18a (emphasis added). The court then noted that the fourth *Daubert* factor — testing — "arguably has some application," because Bihlmeyer had failed to test "the roof crush 'standard'" he proposed. *Ibid.*[5] In the end, however, the district court concluded that to apply this factor would be to improperly "focus[ ] on Bihlmeyer's *conclusions* rather than on the *methodology* he used to reach them," contrary to this Court's teaching in *Daubert*. *Ibid.* (emphasis added). In short, the district court "applied" the *Daubert* factors by concluding that three were "logically" inapplicable and the fourth could not be applied without running afoul of *Daubert* itself.

3. Once respondent's defective arguments are set to one side, it is clear that review should be granted. Again, respondent does not seriously dispute — nor could he — that the issues presented in this case are of "vital significance." Pet. 27. See also CMA/Chamber Br. 3, 17. In fact, by signaling his clear intention to argue that the decision below is correct on the alternative grounds, respondent has only enhanced the attractiveness of this case as a vehicle for clarifying this important area of federal law. See page 8, *supra*.[6]

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[5] Respondent quotes the district court as stating that "'there was no testimony that testing is an essential element in the methodology of development of engineering opinions.'" Opp. 24 n.12 (quoting Pet. App. 18a). As explained in our petition, however, Bihlmeyer himself gave just such testimony. Pet. 5 (citing record).

[6] Respondent states that this Court has "repeatedly declined to review post-*Daubert* challenges to the lower federal courts' decisions regarding the admissibility of expert testimony." Opp. 19; see also *id.* at 19-20 n.11. In many of the cases cited by respondent, however, the certiorari petitions did not present any question concerning the admissibility of expert testimony or the meaning of *Daubert*. The remaining petitions either presented *Daubert* issues quite different from those raised here or were filed before the emergence of a clear conflict at the appellate level.

Nor can it be doubted that the issues raised in this case arise with great frequency. Respondent does not deny that in the three years since *Daubert* was decided, the case has been cited hundreds and hundreds of times by the lower federal courts, that recent statistics show that almost 40,000 new product liability actions are filed in the federal courts each year, or that in "[m]any if not most" of these cases engineers are called as experts to give testimony concerning product design. Pet. 27, 29; see also PLAC/NAM Br. 2, 5-6; CMA/Chamber Br. 16 n.7; MEALEY'S DAUBERT REPORT (Oct. 1996) (publication devoted to tracking post-*Daubert* cases). The recurring nature of the issues presented is accordingly clear.

Finally, it should not be forgotten that the jury in this case returned a verdict of almost $7 million on the strength of testimony that the trial judge excoriated as "preposterous" and "the most ill-supported weakest personal opinion I've ever heard." Pet. C.A. App. 226, 235.[7] The Tenth Circuit's decision to uphold that result on the basis of reasoning that is inconsistent with *Daubert* and irreconcilable with the analysis adopted by other circuits is amply deserving of this Court's review.

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[7] Bihlmeyer's testimony is hardly an isolated example of unreliable engineering testimony. See C.W. Griffin, *Viewpoint: Ban Junk Science From The Courts*, 237 ENGINEERING-NEWS RECORD 89 (Oct. 21, 1996) ("As an expert [consulting engineer] in [construction] litigation, I have encountered opposing experts attempting to repeal Dalton's law of partial pressures, Newton's laws of motion and the second law of thermodynamics — the latter by an 'expert' who claimed that wet insulation had a negative thermal resistance, thus reversing the direction of natural heat flow!").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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